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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TREANDOUS COTTON,

Nos. C 13-3744 WHA (PR)

Plaintiff,

**ORDER GRANTING MOTION TO
WITHDRAW MOTION TO
DISMISS; SCHEDULING MOTION
FOR SUMMARY JUDGMENT**

vs.

MATTHEW CATE; RANDY
GROUNDS; J. YOUNG; A.
LANDOU; DOES,

Defendants

(Dkt. 14, 30)

Plaintiff, a pro se prisoner, filed this civil rights case under 42 U.S.C. 1983. Defendants filed a motion to dismiss the claims on the grounds that plaintiff had not administratively exhausted them prior to filing suit. Defendants have filed a motion to withdraw the motion to dismiss and for leave to file a motion for summary judgment. *See Albino v. Baca*, No. 10-55702, slip op. at 4 (9th Cir. Apr. 3, 2014) (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust should be raised in an unenumerated Rule 12(b) motion, and requiring defendants to produce evidence proving failure to exhaust in a motion for summary judgment). Under *Albino*, the exhaustion argument must be raised in a summary judgment motion and may not be considered in defendants' motion to dismiss. Defendants' motion to withdraw the motion to dismiss is **GRANTED**.

In order to expedite the resolution of this case:

1. No later than **91 days** from the date this order is filed, defendants shall file a motion for summary judgment. If defendants are of the opinion that this case cannot be resolved by

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summary judgment, they shall so inform the court prior to the date the summary judgment motion is due. All papers filed with the court shall be promptly served on the plaintiff.

2. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the court and served upon defendants no later than **28 days** from the date of service of the motion. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

3. Defendants **shall** file a reply brief no later than **14 days** after the date of service of the opposition.

4. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court so orders at a later date.

5. Along with their motion, defendants shall file proof that they served plaintiff the warning required by *Woods v. Carey*, No. 09-15548, slip op. 7871 (9th Cir. July 6, 2012), at the same time they served him with their motion. Failure to do so will result in the summary denial of their motion.

IT IS SO ORDERED.

Dated: May 23, 2014.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.